80-840

Supreme Court, U. S.
FILED
NOV 24 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1980

No. .....

GARRY WEBER, ET AL.,

Petitioners,

v.

BENNY B. BARRETT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH DISTRICT

LAW OFFICES OF EARL LUNA
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QUESTION PRESENTED FOR REVIEW

WHETHER ONE MAY RECOVER ATTORNEY'S FEES ON APPEAL UNDER 42 U.S.C. § 1988 AGAINST PETITIONERS WHO WERE NEVER PARTIES TO THE CIVIL RIGHTS SUIT BUT UNSUCCESSFULLY ATTEMPTED TO INTERVENE.

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In The

Supreme Court of the United States

OCTOBER TERM, 198.

No. .....

GARRY WEBER, ET AL.,

Petitioners,

v.

BENNY B. BARRETT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Your Petitioners[1] respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled cause on July 17, 1980.

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[1]The Petitioners are Dallas County, County Judge Garry Weber, County Commissioner Jim Jackson, County Commissioner Nancy Judy, County Commissioner Jim Tyson, and County Commissioner Roy Orr, comprising the Commissioners Court of Dallas County, the governing body of Dallas County, Texas. The Respondent is Benny B. Barrett, a former deputy sheriff of Dallas County.

OPINIONS BELOW

A copy of the unpublished opinion of the United States Court of Appeals for the Fifth Circuit is attached hereto in Appendix B allowing Respondent attorney fees on appeal of the denial of intervention. Also attached in Appendix B is a copy of the Fifth Circuit's Order denying a rehearing en banc.

A copy of an Order of a single judge of the Fifth Circuit filed May 12, 1980, granting attorney's fees on appeal and copy of the Fifth Circuit Order filed June 19, 1980, setting aside the May 12, 1980, Order of the single judge are attached hereto in Appendix C.

A copy of the unpublished opinion of the United States Court of Appeals for the Fifth Circuit affirming the denial of intervention by the United States District Court for the Northern District of Texas is attached hereto in Appendix D.

A copy of the United States District Court's Order denying Petitioners' intervention is attached hereto in Appendix E.

GROUNDS FOR JURISDICTION

The judgment sought to be reviewed was entered by the United States Court of Appeals for the Fifth Circuit on July 17, 1980, and Petitioners' Motion for Rehearing En Banc was denied September 5, 1980. This petition for certiorari was filed within ninety days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

WHETHER ONE MAY RECOVER ATTORNEY'S FEES ON APPEAL UNDER 42 U.S.C. § 1988 AGAINST PETITIONERS WHO WERE NEVER PARTIES TO

THE CIVIL RIGHTS SUIT BUT UNSUCCESSFULLY ATTEMPTED TO INTERVENE.

STATUTES INVOLVED

42 U.S.C. § 1988.

This statute is set forth in Appendix A.

STATEMENT OF THE CASE

Benny B. Barrett, Respondent, filed a 42 U.S.C. § 1983 civil rights suit against Carl Thomas in the United States District Court for the Northern District of Texas, claiming that Carl Thomas, Sheriff of Dallas County, Texas, fired him for political reasons. Respondent not only did not sue Petitioners in the civil rights case, he successfully opposed their attempted intervention in the civil rights suit he had filed against Thomas.

Petitioners appealed the denial of intervention to the United States Court of Appeals for the Fifth Circuit. That Court affirmed the District Court judgment denying intervention. (Appendix D).

Respondent filed a motion for attorney fees on appeal, based on his being the "prevailing party on appeal", even though Respondent had not sued Petitioners in the civil rights case and successfully opposed their attempted intervention as parties in said suit.

On May 12, 1980, a single Judge granted the motion for attorney's fees and remanded same to the trial court to determine the amount of the fees. (Appendix C). Upon motion of Petitioners, the Order of May 12, 1980, was set aside on the ground that it was a matter properly to be considered by the entire panel. (Appendix C).

A Panel for the United States Court of Appeals for the Fifth Circuit granted said motion and remanded the cause

to the trial court to determine the amount of attorney's fees. (Appendix B).

Petitioners filed a motion for a rehearing en banc and same was denied on September 5, 1980. (Appendix B).

42 U.S.C. §1988 provides in the final sentence that:

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title .... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as a part of the costs."

The Fifth Circuit noted that Respondent was "a clear and undisputed winner" on appeal and that Petitioners were "not prevailing parties" under 42 U.S.C. § 1983. Since, therefore, Respondent prevailed on his underlying claim against Thomas and part of this attorney's time was spent in preventing the judgment against Thomas from being derailed as a result of the attempts to intervene, Petitioners cannot be " . . . excused from the burden of these costs simply because we did not hold they were liable for the judgment on the merits against Sheriff Thomas, an issue never raised or considered by the trial court."

The Court allowed the attorney fees to the winner of an appeal from the denial of an intervention even though the "clear and undisputed winner" has never prevailed on the merits of any Civil Rights claim against the Petitioners. The results of the Fifth Circuit action is to permit one to recover attorney fees under 42 U.S.C. § 1988 from those who were not sued under either section 1981, 1982, 1983, 1985 or 1986 of 42 U.S.C.

REASON FOR GRANTING WRIT

The Court should grant a review on writ of certiorari of the judgment of the United States Court of Appeals for

the Fifth Circuit because that decision is in conflict with the decision of this Court construing the terms of a Federal statute.

Direct Conflict With a Decision of This Court Construing A Federal Statute.

The decision of the Court of Appeals for the Fifth Circuit in this case conflicts with the per curiam decision of this Court in *Hanrahan v. Hampton*, 48 LW 3780, 100 S.Ct. 1987 (1980), construing 42 U.S.C. § 1988, as well as the cases cited therein.

The usual rule in this country that each party is to bear the expense of his own attorney is departed from by 42 U.S.C. § 1988. Where a prevailing plaintiff is awarded attorney's fees under this statute, we are dealing with circumstances where fees are awarded against a violator of federal law. Petitioners not only were not found to be violators of federal law, the Plaintiff (Respondent) did not even make a claim against them. Therefore, it could hardly be said that Respondent prevailed on the merits of a civil rights claim against Petitioners. Respondent did prevail in the Fifth Circuit appeal affirming the District Court's refusal to permit Petitioners to intervene.

This Court made it clear in *Hanrahan v. Hampton*, 48 LW 3780, 100 S.Ct. 1987 (1980), that 42 U.S.C. §1988, by its terms, permits an award of attorney fees only to a "prevailing party" and that the Court of Appeals was authorized to award respondents the attorney's fees attributable to their appeal only if by reason of obtaining a partial reversal of the trial court's judgment, they prevailed within the meaning of § 1988. The Appeals Court, therefore, could only award attorney's fees to Respondent Barrett if by obtaining an affirmance of the trial court's judgment denying Petitioners attempted intervention, he prevailed within the

meaning of § 1988. The Court concluded in *Hanrahan*, supra, that while respondents did prevail on matters in the sense that the Court of Appeals overturned several rulings against them by the District Court, they were not prevailing parties in the sense intended by 42 U.S.C. § 1988, as amended. Respondent Barrett prevailed in the sense that the District Court judgment denying the intervention was affirmed. As the Circuit Court put it:

> "On the issue before us on appeal, there was a clear and undisputed winner: the appellee."

But he was not a "prevailing party" in the sense intended by 42 U.S.C. § 1988. The Respondent did not make a civil rights claim against Petitioners and did not want them in the civil rights suit he had filed against Carl Thomas. In *Hanrahan*, supra, the respondents had not prevailed on the merits of any of their civil rights claims, the favorable rulings in the Court of Appeals were not matters on which a party could "prevail" for the purposes of shifting his counsel fees to the opposing party under § 1988.

Respondent Barrett and the Circuit Court erroneously took the position that since he had prevailed against one party (Thomas), he was entitled to an award of attorney fees against Petitioners since their intervention, if successful, could have damaged or "derailed" his judgment against Thomas.

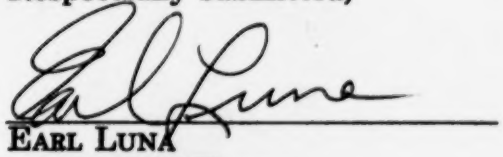
The Circuit Court cited *Iranian Students Ass'n v. Edwards*, 604 F.2d 352 (5th Cir. 1979); *Criterion Club of Albany v. Board of Commissioners*, 594 F.2d 118 (5th Cir. 1979); and *Brown v. Culpepper*, 559 F.2d 274 (5th Cir. 1977) as authority for allowing the attorney fees. An examination of those cases reveals that neither of them involved facts where there was no prevailing party on the merits of a civil

rights claim as existed in *Hanrahan*, supra, and the case at bar. Although Petitioners relied on *Hanrahan*, supra, the Circuit Court failed to cite it in the opinion. Recognizing that attorney fees are not allowed "where the procedural issue is merely a question raised on the way to the main issue" and further recognizing that this appeal was a procedural one, the right to intervene, the Court observed that "If the Appellants had prevailed on appeal, Barrett's substantive judgment would have been imperiled. The outcome on appeal was not interlocutory interpretation but a final judgment on the question presented." Yet, it did not constitute a final judgment where Respondent recovered on the merits of a civil rights claim against Petitioners.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,



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PROOF OF SERVICE

STATE OF TEXAS
COUNTY OF DALLAS

Before me, the undersigned Notary Public in and for Dallas County, Texas, on this day personally appeared EARL LUNA, who being by me duly sworn upon oath stated: I, EARL LUNA, am a member of the Bar of the Supreme Court of the United States and have been the attorney of record for petitioners herein in all proceedings had in the Courts below.

I further state upon oath that upon the 20th day of November, 1980, I served copies of the foregoing Petition for Writ of Certiorari on the Respondent, Benny B. Barrett, by depositing the same in the United States Mail, with first class postage prepaid, addressed to the following counsel of record in the Courts below, at the address indicated to-wit: Mr. James C. Barber, 318 Merchants State Bank Building, 5217 Ross Avenue, Dallas, Texas 75206.

Earl Luna

SUBSCRIBED AND SWORN TO before me by the said EARL LUNA, this the 20th day of November, 1980.

Notary Public,
Dallas County, Texas

APPENDIX

APPENDIX A

42 U.S.C. § 1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

As amended Pub.L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641.

B-1

In The

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. S79-2183

BENNY B. BARRETT,

Plaintiff-Appellee,

versus

CARL THOMAS, Sheriff,

Defendant-Appellee,

COUNTY JUDGE GARRY WEBER,

ET AL.,

Movants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

ON MOTION FOR ATTORNEY'S FEES

Before GEE, RUBIN AND POLITZ, Circuit Judges.

RUBIN, Circuit Judge.

The issue on appeal was whether the trial court had erred in denying appellants the right to intervene. This court affirmed the trial court's decision. The appellee is clearly the prevailing party. The appellants develop an interesting and complicated syllogism: the opinion makes it clear that there was no need for the intervention, hence the intervenor is protected; therefore, the intervenor prevailed. The argument rests on an erroneous premise: that victory is to be determined esoterically on the basis of whether the ultimate effect of a decision is subjectively pleasing to the litigant. We must proceed on a more pragmatic basis: we look to the issues

presented and consider whether the party who presented them prevailed in whole or in part. On the issue before us on appeal, there was a clear and undisputed winner: the appellee. The mere fact that appellants have been comforted to some degree by learning that they will not be made liable without first being given an opportunity to defend themselves does not make them "prevailing parties" under 42 U.S.C. § 1988.

Appellee has prevailed on his underlying claim against defendant Sheriff Thomas. Part of the cost involved in so prevailing was the devotion of his attorney's time and effort in successfully preventing the initial judgment against Thomas from being derailed as a result of appellants' attempts to intervene. Appellants cannot now be excused from bearing the burden of these costs simply because we did not hold they were liable for the judgment on the merits against Sheriff Thomas, an issue never raised or considered by the trial court.

Appellants have argued that the effect of the trial court's denial of intervention was that "they (appellants) never became parties to the proceedings." It is correct that, in Weiser v. White, 505 F.2d 912, 918 (5th Cir.), *cert. denied*, 421 U.S. 993, 95 S.Ct. 1998, 44 L.Ed.2d 482 (1975), we refused to assess costs because we never had the jurisdiction necessary to order the payment of attorney's fees. However, that case involved an attempt to appeal two separate orders of a *three-judge court* denying intervention and denying attorney's fees. Exclusive jurisdiction lay in the Supreme Court and we, therefore, lacked jurisdiction to hear the appeals. 505 F.2d at 918. Here appellants sought to have this court, which clearly had jurisdiction over their appeal, declare that they had a right to intervene. The relief they sought was unequivocally denied. The appellants were properly before this court for the purpose of pursuing their appeal, and are properly before us for purposes of determining their liability for attorney's fees generated by the appeal.

In Iranian Students Ass'n v. Edwards, 604 F.2d 352, 353 (5th Cir. 1979), we stated:

> It is well settled that a plaintiff prevailing in actions subject to 42 U.S.C. § 1988 is ordinarily entitled to attorney's fees unless special circumstances exist to render such an award unjust.

See also Criterion Club of Albany v. Bd. of Commissioners, 594 F.2d 118, 120 (5th Cir. 1979); Brown v. Culpepper, 559 F.2d 274, 277 (5th Cir. 1977).

Appellants also urge that the attorney's fees are not usually due for a procedural victory but only for substantive triumph. Where the procedural issue is merely a question raised on the way to the main event, the proposition is correct. Here, however, the question raised was a procedural one: the alleged right to intervene. If the appellants had prevailed on appeal, Barrett's substantive judgment would have been imperilled. The outcome on appeal was not an interlocutory interpretation but a final judgment on the question presented. For these reasons, the appellee will be allowed costs and, as an item of costs, attorney's fees for defending this appeal. While we have the authority to set attorney's fees, Knighton v. Watkins, 616 F.2d 795, 801 (5th Cir. 1980), we think it better, under the circumstances, to make it possible for an evidentiary hearing to be held. Therefore, the case is remanded to the district court for such proceedings as may be necessary to determine the amount of the fees and other appropriate items in accordance with the standards in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974).

B-4

In The

United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 79-2183

BENNY B. BARRETT,
Plaintiff-Appellee,

versus

CARL THOMAS, Sheriff,
Defendant-Appellee,

COUNTY JUDGE GARRY WEBER,
ET AL.,
Movants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion 7-17-80, 5 Cir., 197...., ...F.2d.....).

(September 5, 1980)

Before GEE, RUBIN AND POLITZ, Circuit Judges.
PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the mem-

bers of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

Form 704-2

C-1

In The

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. S79-2183

BENNY B. BARRETT,

Plaintiff-Appellee,

versus

CARL THOMAS, Sheriff

Defendant-Appellee,

COUNTY JUDGE GARRY WEBER,
ET AL.,

Movants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

---

ORDER:

IT IS ORDERED that the motion of appellees for award of attorney's fees is GRANTED. The case is remanded to the District Court for such proceedings as may be necessary to determine the amount of the fees and other appropriate items in accordance with the standards in Johnson v. Georgia Highway Express, Inc. 488 F2d 714 (5th Cir. 1974).

/s/ ALVIN B. RUBIN
United States Circuit Judge

C-2

In The

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. S79-2183

BENNY B. BARRETT,

Plaintiff-Appellee,

versus

CARL THOMAS, Sheriff

Defendant-Appellee,

COUNTY JUDGE GARRY WEBER, ET AL.,

Movants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

ORDER:

IT IS ORDERED that the order of the court filed May 12, 1980, granting the motion of appellees for award of attorneys' fees, is hereby set aside. The matter appears properly to be one for consideration by the entire panel.

Should the mover desire to file any further memorandum, the memorandum of authorities in support of the motion shall be filed within ten days, that is, by June 18, 1980. Opponents of the motion are allowed ten additional days, until June 28, 1980, within which to reply.

United States Circuit Judge

In The

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 79-2183

Summary Calendar*

BENNY B. BARRETT,

Plaintiff-Appellee,

versus

CARL THOMAS, Sheriff

Defendant-Appellee,

COUNTY JUDGE GARRY WEBER, ET AL.,

Movants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

(April 11, 1980)

Before GEE, RUBIN AND POLITZ, Circuit Judges.

PER CURIAM:

A former employee of the Sheriff of Dallas County, Texas, acting as representative of persons then or previously employed by the Sheriff, brought suit to enjoin the enforcement of certain of the Sheriff's rules on the ground that these unconstitutionally impaired his Fourteenth and First Amendment rights, to gain reinstatement and to recover back pay. After a jury trial concerning the discharge and back pay issues and the entry of an interim judgment of liability against the Sheriff, but before the district judge had entered a final judgment, the Dallas County Commissioner and the County Judge sought to intervene because county funds might be liable for a judgment against the Sheriff. They

*Fed. R. App. P. 34(a); 5th Cir. R. 18.

sought a declaration that the County is not liable. The trial court denied the motion to intervene on the triple grounds that it was untimely, that the Sheriff adequately represented their interest and that the parties would be prejudiced by belated intervention. Finding that the trial judge did not abuse his discretion, we affirm.

Any intervention, whether permissive or of right, must be asserted by "timely application." Fed. R. Civ. P. 24(a),(b). Timeliness is not measured by a judicial stop watch or by a pleadings gauge; its determination rests on the sound discretion of the trial judge. NAACP v. New York, 413 U.S. 345, 93 S.Ct. 2591, ... L.Ed.2d ..... (1973); Stallworth v. Montsanto Co., 558 F.2d 257, 263 (5th Cir. 1977); United States v. United States Steel Corp., 548 F.2d 1232, 1235 (5th Cir. 1977); Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1133 (5th Cir. 1970); C. Wright & A. Miller, Federal Practice and Procedure § 1916 (1972). That discretion turns in large measure on the length of time during which the proposed intervenor knew of the suit and its possible effect on him and the prejudice to other parties that would ensue from granting the motion at that stage of the litigation. Stallworth v. Montsanto Co., 558 F.2d 257, 264-65 (5th Cir. 1977); United States v. United States Steel Corp., 548 F.2d 1232, 1236 (5th Cir. 1977); Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1125 (5th Cir. 1970); *see* NAACP v. New York, 413 U.S. 345, 366-70, 93 S.Ct. 2591, 2603-04, ... L.Ed.2d ....., ... (1973). The trial judge should also consider prejudice to the would-be intervenor from being denied intervention and the existence of "unusual circumstances" militating for or against a finding of timeliness. Stallworth v. Montsanto Co., 558 F.2d 257, 265-66 (5th Cir. 1977).

The suit had been pending more than two years and had been tried on the merits when the motion was filed. The trial judge found that the County Commissioners knew of the suit and had ample opportunity to intervene earlier. The Commissioners do not deny this; they instead assert that only after money judgment was imminent did they realize that the plantiffs might seek to collect from county funds.

The failure subjectively to appreciate the perils posed by a suit cannot excuse delay. To permit intervention while the trial court was deliberating on a judgment, after all proceedings in the case had been completed, would have injected new issues and required new briefs, new argument and, perhaps, additional evidence. There was ample support for the judge's decision that the parties would suffer substantial prejudice and appreciable delay.

There is no irreparable prejudice to the County Commissioners. Judgment was entered against the Sheriff alone. It expressly states that it "draws no conclusions concerning the liability, if any, of the County of Dallas, Texas, for complying with the provisions of the judgment." If execution on the judgment is levied on county funds, the County may then oppose it.

Accordingly, the judgment is AFFIRMED.

E-1

In The

United States District Court

for the Northern District of Texas

Dallas Division

Cause No. CA3-77-1501-F

BENNY B. BARRETT,

versus

CARL THOMAS, Sheriff

ORDER DENYING INTERVENTION

Garry Weber, County Judge of Dallas County, and County Commissioners Jim Jackson, Nancy Judy, Jim Tyson and Roy Orr have filed a motion to intervene in this lawsuit, and for leave to file a Cross Claim against Defendant Carl Thomas. These proposed intervenors also seek to bring in an additional party, Fidelity & Deposit Co. of Maryland, the surety on Carl Thomas' bond.

The proposed intervenors argue that they are concerned that any judgment by Barrett and the class against Carl Thomas may have to be paid from the county treasury, and such payment would impair the Commissioners' ability to see that Dallas County funds are paid as budgeted. They allege in their brief that they have the right to intervene under Federal Rule of Civil Procedure 24(a) because any judgment in this case will impair or impede their ability to protect a claimed interest in county property.

The motion to intervene, the Commissioners contend, is timely because Barrett has been denied relief and the claims of the unnamed class members have not been decided by the Court. Thomas is allegedly not protecting the County's

interests in the lawsuit; in fact, the Commissioners allege that his interests could be adverse to the county if the court determines that Thomas is liable in some manner for a judgment in this case.

Timeliness of the Motion

A motion to intervene must be timely filed. *FMC Corp. v. Keizer Equipment Co.*, 433 F2d 654 (6th Cir. 1970). When examining a motion to intervene, a Court must consider whether or not the applicant was in a position to seek intervention at an earlier stage in the case. *FMC, supra; see Iowa State University Research Foundation Inc. v. Honeywell, Inc.* 459 F.2d 447 (8th Cir. 1972).

In this case the Commissioners have filed a motion to intervene after trial on the liability issues in the lawsuit, and one week prior to the Court's scheduled hearing on the issue of damages. The lawsuit was filed in 1977, two years ago; one year ago this Court entered a preliminary injunction enjoining the Sheriff from enforcing certain rules and regulations. No motion to intervene was filed during this two year period; instead, the Commissioners waited until the eve of judgment to assert their claims, apparently when they awoke to face the possibility that they, rather than Carl Thomas, might ultimately be responsible for paying any judgment imposed in this case. The Commissioners have had ample opportunity at earlier stages of this proceeding to intervene; at present their motion is untimely.

Commissioners cite one case for authority that they have asserted a timely motion to intervene, *United Airlines v. McDonald Douglas*, 53 L.Ed. 2d 423 (1977). In that case applicants to intervene were putative class members who sought to intervene *for the limited purpose* of appealing the denial of class certification. The District Court refused to certify denial of class certification for interlocutory appeal, and therefore no appeal could be taken until after a final judgment was entered by the Court. *Promptly* after final judgment was entered the putative class members sought to intervene to appeal.

The Supreme Court emphasized in permitting the intervention that the *proper time* to intervene *in that case* was after entry of final judgment; to seek to intervene earlier would have meant that the putative class members would have been spectators to the proceedings until the entry of final judgment.

In this case, however, the Commissioners could have intervened two years ago and would not have been spectators to the proceedings; the issues they seek to raise now could have been argued to the Court, and decided along with the rest of the lawsuit. Now, on the eve of the Court's entry of final judgment, to permit the intervention would mean postponement of the April 2, 1979 hearing, postponement of the entry of judgment, and injection of a new controversy into the lawsuit.

Right to Intervene

The Commissioners appear to be under the false impression that this Court, without the participation of the Commissioners in this lawsuit, will be deciding in its final judgment whether the County of Dallas and the Dallas County Commissioners are liable for any judgment against Carl Thomas in this case. That issue is not now before the Court, and has never been raised in this case until the Commissioners filed their petition in intervention. The Court, as indicated in its memorandum order, will enter judgment against the Defendant in this case, Carl Thomas, and not against the Commissioners. If Carl Thomas believes, or the Plaintiffs believe, that the Commissioners, or Dallas County, or the Fidelity & Deposit Co. of Maryland is liable for the judgment against Thomas, they are free to request payment and, if denied, file a lawsuit to collect the money they feel is owed to them by those, or any other, entities. Thus, contrary to the Commissioners' assertions, this Court's judgment will not impede or impair the Commissioners' ability to protect any interest they have in this lawsuit.

Adequacy of Thomas's Representation

Where the interest of the intervenor is identical with that of a party, it is presumed that the party will adequately protect the intervenor. *Penick v. Columbus Educational Association*, 574 F.2d 889 (6th Cir. 1978). The interests of the Commissioners and the Sheriff are identical in this lawsuit, with the possible exception that there may be some conflict as to who should pay any judgment. Any dispute about who should pay the judgment should be and can be resolved between the Sheriff and the Commissioners' Court, and should not become, at this late stage, a new issue in this nearly completed case.

Permissive Intervention

Timeliness is required for a petition in intervention under Rule 24(b) and, as discussed earlier, the Commissioners' motion is not timely. There are also no common questions of law or fact; the issues currently before the Court involve the amount of damages to be assessed, and the issues in the original lawsuit involved whether or not the Sheriff took illegal politically-motivated action against the class. Commissioners do not seek to raise these issues.

Finally, substantial prejudice would occur if the intervention were permitted because the class remedy hearing, which has been set for nearly two months, would have to be postponed, causing considerable delay in this case at a time when the case is nearly concluded.

For the reasons stated, the motion of the Commissioners to intervene is denied.

IT IS SO ORDERED.

United States District Judge

March 29, 1979

DEC 22 1980
MICHAEL RODAK, JR., CLERK

No. 80-840

In the Supreme Court of the United States

October Term, 1980

GARRY WEBER, ET AL.,
Petitioners,

vs.

BENNY B. BARRETT,
Respondent

BRIEF OF RESPONDENT BENNY B. BARRETT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Attorneys for Respondent
Benny B. Barrett

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No. 80-840

In the Supreme Court of the United States

October Term, 1980

GARRY WEBER, ET AL.,
Petitioners,

vs.

BENNY B. BARRETT,
Respondent

BRIEF OF RESPONDENT BENNY B. BARRETT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent Benny B. Barrett files this his brief in opposition to the petition for writ of certiorari filed on behalf of petitioners Garry Weber, County Judge of Dallas County, and County Commissioners Jim Jackson, Nancy Judy, Jim Tyson and Roy Orr, who sought intervention in the trial on the merits of *Benny B. Barrett v. Carl Thomas, Sheriff,* Cause No. CA-3-77-1501-F in the United States District Court for the Northern District of Texas, Dallas Division and Cause No. 79-2183 in the United States Court of Appeals for the Fifth Circuit, and were denied this intervention. The denial of intervention was upheld by the Fifth Circuit Court of Appeals, in its order dated April 11, 1980 (Appen-

dix "A"). Subsequently, after respondent's motion for attorney's fees, the appellate court entered an award granting these attorney's fees on July 17, 1980 (Appendix "B"). Subsequently, they denied petitioners' motion for rehearing and motion for rehearing *en banc,* and thereafter petitioners filed a petition for writ of certiorari in this Court, appealing the granting of attorney's fees, but not the denial of intervention.

STATUTES INVOLVED

Petitioners agree with respondent that the only statute involved is 42 U.S.C. §1988, which is set forth in Appendix "C".

ARGUMENT

I. The Writ Should Not Be Allowed Because the Decision of The Court of Appeals for the Fifth Circuit was Consistent with the Decisions of This Court

Petitioners argue that the decision of the Court of Appeals for the Fifth Circuit to award respondent attorney's fees for successfully defending petitioners' attempted intervention conflicts with the recent holding of this Court in *Hanrahan v. Hampton,* 100 S. Ct. 1987, 48 U.S.L.W. 3780 (1980). Such contention is without foundation.

In *Hanrahan,* this Court held that plaintiffs who had obtained a reversal in the appellate court of a directed verdict rendered in the district court were not "prevailing parties" under 42 U.S.C. §1988 entitled to attorney's fees from the opposing parties. The critical distinction between *Hanrahan* and the instant case is that in *Hanrahan* the plaintiffs had not yet prevailed on the merits of any of

their claims of deprivation of civil rights. In the instant case, unlike *Hanrahan,* the respondent and the class had already achieved a complete victory on the merits of their underlying civil rights claims prior to successfully opposing the petitioners' appeal of the denial of their attempted intervention. This Court made it clear in *Hanrahan* that the reason the plaintiffs in that case were not entitled to attorney's fees was that they had failed to prevail on the merits of *any* of their claims. This Court stated:

> The respondents have of course not prevailed on the merits of any of their claims. The Court of Appeals held only that the respondents were entitled to a trial of their cause. As a practical matter they are in a position no different from that they would have occupied if they had simply defeated the defendants' motion for a directed verdict in the trial court. The jury may or may not decide some or all of the issues in favor of the respondents. If the jury should not do so on remand in this case, it could not seriously be contended that the respondents had prevailed.

Id. at 3781.

Respondent submits that by prevailing on petitioners' appeal of the denial of their attempted intervention, he has preserved his triumph on the merits of the underlying claims. Had he *lost* the appeal, respondent would have been placed in the posture of the plaintiffs in *Hanrahan.* He would have faced the prospect of a new trial on the merits of his claims, in which the jury might or might not decide the issues in his favor. Since he did retain his victory on the merits by prevailing on

the appeal, respondent achieved a result exactly opposite of that achieved by the winners of the appeal of the directed verdict in *Hanrahan,* who were held not to be "prevailing parties" under 42 U.S.C. §1988.

An assessment of what the detrimental effect on respondent's previous victory would have been had he lost the appeal helps to explain why he is indeed a "prevailing party" under 42 U.S.C. §1988. Had petitioners won the appeal, the only way to allow them to intervene would have been for the appellate court to vacate the judgment against Sheriff Thomas and remand the entire cause for a new trial. In this respect alone, respondent would have lost his favorable judgment on the merits. Further, it is uncertain whether respondent would have prevailed in a new trial on the merits of his claims. The issues and defenses which petitioners, as intervenors, would have been allowed to raise might have led to a different outcome than that which respondent achieved in the first trial. Petitioners would be allowed to introduce into such a trial issues and defenses going far beyond the scope of those considered in the trial already completed.[1]

An example of a defense not raised in the previous trial which petitioners would very likely have raised in a subsequent trial is mentioned by petitioners in their brief on appeal of the denial of their attempted intervention. Petitioners there asserted that they could present a good faith

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1. *Spangler v. U.S.,* 415 F.2d 1242, 1245 (9th Cir. 1969); *Stewart-Warner v. Westinghouse Electric Corp.,* 325 F.2d 822, 827 (2d Cir. 1963), *cert. denied,* 376 U.S. 944 (1964). This Court has said in dictum that "when intervention is permitted generally, the intervenor has a right to jury trial on any legal issues he presents." *Ross v. Bernhard,* 396 U.S. 531, 541 n.15 (1970).

immunity defense on behalf of Dallas County and the Commissioners Court were they allowed to take part in a new trial on the merits of respondent's claims.[2] Introduction of such a defense would totally confuse the issues at trial. Moreover, such a defense would have been totally unnecessary in the first instance since respondent has never claimed the petitioners committed the acts which he alleged were performed by Thomas. This latter aspect concerns the needlessness of the petitioners' attempted intervention and will be considered further below.

Clearly, if petitioners had been permitted to intervene after judgment, they would have caused a reversal and remand of the cause just as surely as they would had they been defendants in the original suit. Viewed in such a light, respondent's victory in the intervention appeal is no different from the successful defense of an appeal by a plaintiff seeking to preserve his judgment on the merits. Therefore, respondent is entitled to attorney's fees for successfully defending the appeal of the intervention denial, since plaintiffs are entitled to attorney's fees for successfully defending appeals by defendants in civil rights cases. *McManama v. Lukhard,* 616 F.2d 727, 730 (4th Cir. 1980).

The remaining contention of petitioners is their argument that since they were never parties to a civil rights suit brought by respondent against them, they should not have attorney's fees assessed against them under 42 U.S.C. §1988. The response

2. *See* Brief of Appellants in appeal to Fifth Circuit of denial of intervention at p. 2. (Appendix "D").

to such a claim is that since the appellate court had jurisdiction to consider the appeal by petitioners of the denial of intervention, it also had jurisdiction to decide the question of whether to assess attorney's fees against them.

The proper approach to appellate consideration of district court denials of intervention, and the one which a number of circuit courts have taken, is to assume jurisdiction for the purpose of considering the appeal of the order of denial, and to affirm the denial rather than dismiss the appeal if the court finds the denial to have been proper. *Korioth v. Briscoe,* 523 F.2d 1271, 1279 n.26 (5th Cir. 1975); *SEC v. Everest Management Corp.,* 475 F.2d 1236, 1238 n.2 (2d Cir. 1972); *Gerstle v. Continental Airlines, Inc.,* 466 F.2d 1374, 1378 (10th Cir. 1972). The Fifth Circuit evidently adopted the more practical approach in considering the appeal of the denial of intervention in this case. In its opinion awarding respondent attorney's fees on appeal in this appeal, the Court said:

> Here appellants sought to have this court, which clearly had jurisdiction over their appeal, declare that they had a right to intervene. The relief they sought was unequivocally denied. The appellants were properly before this court for the purpose of pursuing their appeal, and are properly before us for purposes of determining their liability for attorney's fees generated by the appeal.

(Fifth Circuit Opinion Granting Attorney's fees at p. 2 — Appendix "B").

The appellate court in this case considered the intervention appeal by assuming jurisdiction

and then examining the appeal on its merits. Petitioners cannot seriously contend that they can avail themselves of the appellate court's jurisdiction for the purpose of pursuing their appeal, but at the same time not be subject to all attendant aspects of that jurisdiction. Certainly if the court had held that the intervention should have been granted, petitioners would have admitted jurisdiction.

II. In Light of the Unnecessary and Frivolous Nature of Petitioners' Appeal, Review by This Court is Especially Unwarranted

Respondent submits that appeal of the denial of intervention by petitioners was absolutely unnecessary and would arguably have entitled respondent to attorney's fees under federal common law existing prior to the passage of 42 U.S.C. §1988 and still in effect at the present. Petitioners sought to intervene for the purpose of challenging any finding by the district court that they were liable for the judgment obtained by respondent against Thomas, dated May 30, 1979. That judgment, however, speaks in unequivocal terms to the issue of the liability of the County of Dallas, saying:

> This judgment is entered against Carl Thomas, Sheriff, and draws no conclusions concerning the liability, if any, of the County of Dallas, Texas for complying with the provisions of this judgment.[3]

This conclusion by the district court clearly indicates that petitioners had no conceivable interest

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3. *See* Judgment entered by the District Court for the Northern District of Texas, Dallas Division, in the cause of *Benny B. Barrett v. Carl Thomas, Sheriff*, No. CA-3-77-1501-F, dated May 30, 1979. (Appendix "E").

in intervening in the suit against Thomas once they had learned of the terms of the judgment. Despite the assurance the judgment gave them that no findings as to county liability had been made, petitioners continued to pursue the appeal of the intervention denial.[4] On page 18 of their brief on the appeal of the intervention denial, petitioners assert that "[i]f Dallas County is not liable for the provision of the judgment against Sheriff Thomas, which the district court could have made clear, then there is no need for Commissioners Court to intervene." (*See* petitioners' intervention appellate brief, Appendix "D"). Petitioners thus admitted that if the obvious meaning of the district court's judgment was recognized, there would be no need for the intervention.

Respondent believes that the real motive behind petitioners' unreasonable pursuit of intervention was to further delay the resolution of respondent's claims against Thomas. Respondent was of course compelled to defend petitioners' frivolous appeal to preserve the judgment he had obtained against Thomas. Respondent contends that as well as being entitled to attorney's fees as a prevailing party under 42 U.S.C. §1988, he would have been entitled to such fees under federal common law which has "long recognized that attorney's fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, ..." *F. D. Rich Co. v. United States ex rel. Industrial Lumber Co.,*

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4. The Certificate of Service of petitioners' brief on the appeal of denial of intervention is dated July 16, 1979, more than a month subsequent to the district court's judgment entered in *Barrett v. Thomas* on May 30, 1979. (Appendix "D").

417 U.S. 116, 129 (1974). *See also Runyon v. McCrary,* 427 U.S. 160, 183 (1976); *Vaughan v. Atkinson,* 369 U.S. 527, 530-31 (1962).

Respondent presses the contention that he would arguably have received attorney's fees under the common law standard to further emphasize to this Court the correctness of the appellate court's decision to award attorney's fees to respondent under 42 U.S.C. §1988. Admittedly, the considerations involved in awarding attorney's fees under the Civil Rights Attorney's Fees Act of 1976 and the federal common law "bad faith" rule differ. The standards which a prevailing plaintiff must meet under 42 U.S.C. §1988 are far less stringent than those under the common law rule — to obtain attorney's fees under 42 U.S.C. §1988 he need merely prevail against the defendant without regard to the defendant's conduct in the litigation. Before the passage of 42 U.S.C. §1988, a prevailing plaintiff seeking to promote public policy or vindicate civil rights was forced to show that the defendant had acted in "bad faith" or had litigated for oppressive or vexatious reasons in order to recover his attorney's fees from the defendant. *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 271 (1975); *Runyon v. McCrary, supra.*

Although respondent maintains that he is fully entitled to attorney's fees under 42 U.S.C. §1988, the likelihood that he would have been entitled to attorney's fees under more exacting federal common law standards suggests that he is even more justified in receiving attorney's fees under §1988 than would be a prevailing plaintiff seeking attorney's fees under §1988 from a defendant who liti-

gated in good faith. Further, in awarding attorney's fees to a prevailing plaintiff under 42 U.S.C. §1988, a court is in effect assessing such fees against a violator of federal law. Respondent submits that by delaying resolution of the matters settled in the underlying suit, and by doing so in obvious bad faith, petitioners are violators of the same federal law which respondent sought to enforce in his suit against Thomas. For these reasons, respondent feels that an even stronger case is made for this Court to refuse to issue the writ of certiorari sought by petitioners.

CONCLUSION

The decision rendered by the Court of Appeals for the Fifth Circuit is consistent with the decision of this Court in *Hanrahan v. Hampton, supra.* Respondent was clearly a prevailing party entitled to attorney's fees under the Civil Rights Attorney's Fees Act of 1976. Moreover, the probability that respondent would also meet the more stringent standards of federal common law governing the award of attorney's fees to a prevailing plaintiff is further grounds upon which this Court may deny the petition for a writ of certiorari to the Court of Appeals for the Fifth Circuit requested by the petitioners.

Respectfully submitted,

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LAW OFFICES OF JAMES C. BARBER
Attorney for Respondent
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Dallas, Texas 75206
(214) 821-8840

PROOF OF SERVICE

THE STATE OF TEXAS }
COUNTY OF DALLAS }

BEFORE ME, the undersigned Notary Public in and for Dallas County, Texas, on this day personally appeared JAMES C. BARBER who being by me duly sworn upon oath stated: I, JAMES C. BARBER, am a member of the Bar of the Supreme Court of the United States and have been the attorney of record for respondent herein in all proceedings had in the Courts below.

I further state upon oath that upon the 19 day of December, 1980, I served copies of the foregoing Brief of Respondent Benny B. Barrett in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, by depositing the same in the United States Mail, with first class postage prepaid, addressed to the following counsel of record in the Courts below, at the address indicated to-wit: Mr. Earl Luna, 1525 Elm Street, 2416 LTV Tower, Dallas, Texas 75201.

James C. Barber

SUBSCRIBED AND SWORN TO BEFORE ME by the said JAMES C. BARBER, this the 19th day of December, 1980.

Notary Public, in and for
Dallas County, Texas

APPENDIX

APPENDIX "A"

In The

United States Court of Appeals
FOR THE FIFTH CIRCUIT

NO. 79-2183
Summary Calendar*

BENNY B. BARRETT,
Plaintiff-Appellee,

versus

CARL THOMAS, Sheriff,
Defendant-Appellee,

COUNTY JUDGE GARRY WEBER,
ET AL.,
Movants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

(APRIL 11, 1980)

Before GEE, RUBIN AND POLITZ, Circuit Judges.

PER CURIAM:

A former employee of the Sheriff of Dallas County, Texas, acting as representative of persons then or previously employed by the Sheriff, brought suit to enjoin the enforcement of certain of the Sheriff's rules on the ground that these unconstitutionally impaired his Fourteenth and First Amendment rights, to gain reinstatement and to recover back pay. After a jury trial concerning the discharge and back pay issues and the entry of an

*Fed. R. App. P. 34(a); 5th Cir. R 18.

interim judgment of liability against the Sheriff, but before the district judge had entered a final judgment, the Dallas County Commissioner and the County Judge sought to intervene because county funds might be liable for a judgment against the Sheriff. They sought a declaration that the County is not liable. The trial court denied the motion to intervene on the triple grounds that it was untimely, that the Sheriff adequately represented their interest and that the parties would be prejudiced by belated intervention. Finding that the trial judge did not abuse his discretion, we affirm.

Any intervention, whether permissive or of right, must be asserted by "timely application." Fed. R. Civ. P. 24(a),(b). Timeliness is not measured by a judicial stop watch or by a pleadings gauge; its determination rests on the sound discretion of the trial judge. NAACP v. New York, 413 U.S. 345, 93 S.Ct. 2591, ____ L.Ed.2d ____ (1973); Stallworth v. Montsanto Co., 558 F.2d 257, 263 (5th Cir. 1977); United States v. United States Steel Corp., 548 F.2d 1232, 1235 (5th Cir. 1977); Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1133 (5th Cir. 1970); C. Wright & A. Miller, Federal Practice and Procedure § 1916 (1972). That discretion turns in large measure on the length of time during which the proposed intervenor knew of the suit and its possible effect on him and the prejudice to other parties that would ensue from granting the motion at that stage of the litigation. Stallworth v. Montsanto Co., 558 F.2d 257, 264-65 (5th Cir. 1977); United States v. United States Steel Corp., 548 F.2d 1232, 1236 (5th Cir. 1977); Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1125 (5th Cir. 1970); *see* NAACP v. New York, 413 U.S. 345, 366-70, 93 S.Ct. 2591, 2603-04, ____ L.Ed.2d ____, ____ (1973). The trial judge should also consider prejudice to the would-be intervenor from being denied intervention and the existence of "unusual circumstances" militating for or against a finding of timeliness. Stall-

worth v. Monstanto Co., 558 F.2d 257, 265-66 (5th Cir. 1977).

The suit had been pending more than two years and had been tried on the merits when the motion was filed. The trial judge found that the County Commissioners knew of the suit and had ample opportunity to intervene earlier. The Commissioners do not deny this; they instead assert that only after money judgment was imminent did they realize that the plaintiffs might seek to collect from county funds.

The failure subjectively to appreciate the perils posed by a suit cannot excuse delay. To permit intervention while the trial court was deliberating on a judgment, after all proceedings in the case had been completed, would have injected new issues and required new briefs, new argument and, perhaps, additional evidence. There was ample support for the judge's decision that the parties would suffer substantial prejudice and appreciable delay.

There is no irreparable prejudice to the County Commissioners. Judgment was entered against the Sheriff alone. It expressly states that it "draws no conclusions concerning the liability, if any, of the County of Dallas, Texas, for complying with the provisions of the judgment." If execution on the judgment is levied on county funds, the County may then oppose it.

Accordingly, the judgment is AFFIRMED.

APPENDIX "B"

In The

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. S79-2183

BENNY B. BARRETT,

Plaintiff-Appellee,

versus

CARL THOMAS, Sheriff,

Defendant-Appellee,

COUNTY JUDGE GARRY WEBER,
ET AL.,

Movants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

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ON MOTION FOR ATTORNEY'S FEES

Before GEE, RUBIN AND POLITZ, Circuit Judges.

RUBIN, Circuit Judge.

The issue on appeal was whether the trial court had erred in denying appellants the right to intervene. This court affirmed the trial court's decision. The appellee is clearly the prevailing party . The appellants develop an interesting and complicated syllogism: the opinion makes it clear that there was no need for the intervention, hence the intervenor is protected; therefore, the intervenor prevailed. The argument rests on an erroneous prem-

ise: that victory is to be determined esoterically on the basis of whether the ultimate effect of a decision is sujectively pleasing to the litigant. We must proceed on a more pragmatic basis: we look to the issues presented and consider whether the party who presented them prevailed in whole or in part. On the issue before us on appeal, there was a clear and undisputed winner: the appellee. The mere fact that appellants have been comforted to some degree by learning that they will not be made liable without first being given an opportunity to defend themselves does not make them "prevailing parties" under 42 U.S.C. § 1988.

Appellee has prevailed on his underlying claim against defendant Sheriff Thomas. Part of the cost involved in so prevailing was the devotion of his attorney's time and effort in successfully preventing the initial judgment against Thomas from being derailed as a result of appellants' attempts to intervene. Appellants cannot now be excused from bearing the burden of these costs simply because we did not hold they were liable for the judgment on the merits against Sheriff Thomas, an issue never raised or considered by the trial court.

Appellants have argued that the effect of the trial court's denial of intervention was that "they (appellants) never became parties to the proceedings." It is correct that, in Weiser v. White, 505 F.2d 912, 918 (5th Cir.), *cert. denied,* 421 U.S. 993, 95 S.Ct. 1998, 44 L.Ed.2d 482 (1975), we refused to assess costs because we never had the jurisdiction necessary to order the payment of attorney's fees. However, that case involved an attempt to appeal two separate orders of a *three-judge court* denying intervention and denying attorney's fees. Exclusive jurisdiction lay in the Supreme Court and we, therefore, lacked jurisdiction to hear the appeals. 505 F.2d at 918. Here appellants sought to have this court, which clearly had jurisdiction over their appeal, declare that they had a right to intervene.

The relief they sought was unequivocally denied. The appellants were properly before this court for the purpose of pursuing their appeal, and are properly before us for purposes of determining their liability for attorney's fees generated by the appeal.

In Iranian Students Ass'n v. Edwards, 604 F.2d 352, 353 (5th Cir. 1979), we stated:

> It is well settled that a plaintiff prevailing in actions subject to 42 U.S.C. § 1988 is ordinarily entitled to attorney's fees unless special circumstances exist to render such an award unjust.

See also Criterion Club of Albany v. Bd. of Commissioners, 594 F.2d 118, 120 (5th Cir. 1979); Brown v. Culpepper, 559 F.2d 274, 277 (5th Cir. 1977).

Appellants also urge that the attorney's fees are not usually due for a procedural victory but only for substantive triumph. Where the procedural issue is merely a question raised on the way to the main event, the proposition is correct. Here, however, the question raised was a procedural one: the alleged right to intervene. If the appellants had prevailed on appeal, Barrett's substantive judgment would have been imperilled. The outcome on appeal was not an interlocutory interpretation but a final judgment on the question presented. For these reasons, the appellee will be allowed costs and, as an item of costs, attorney's fees for defending this appeal. While we have the authority to set attorney's fees, Knighton v. Watkins, 616 F.2d 795, 801 (5th Cir. 1980), we think it better, under the circumstances, to make it possible for an evidentiary hearing to be held. Therefore, the case is remanded to the district court for such proceedings as may be necessary to determine the amount of the fees and other appropriate items in accordance with the standards in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974).

APPENDIX "C"

§ 1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

As amended Pub.L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641.

APPENDIX "D"

(Except from petitioners' brief on appeal to the Fifth Circuit)

NO. 79-2183

In The

United States Court of Appeals

FOR THE FIFTH CIRCUIT

BENNY B. BARRETT,

Plaintiff-Appellee,

versus

CARL THOMAS, Sheriff,

Defendant-Appellee,

GARRY WEBER, ET AL.,

Movants-Appellants.

On Appeal from the United States District Court for the Northern District of Texas

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BRIEF OF APPELANTS

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Attorneys for Appellants

. . . In denying the motion to intervene the district court stated that "this Court's judgment will not impede or impair the Commissioners' ability to protect any interest they have in this lawsuit." If Dallas County is not liable for the provision of the judgment against Sheriff Thomas, which the district court could have made clear, then there is no need for Commissioners Court to intervene. However, if the judgment could be interpreted to obligate county funds, then the Commissioners Court's ability to protect its interest has been impaired and impeded by not having the opportunity to have the district court exempt county funds from any obligations of the judgment. The district court indicated that the Commissioners Court would get a full opportunity to protect their interest in subsequent litigation if the plaintiffs or the Sheriff tried to make the County pay any portion of the judgment. Barrett's recent motion for an order of execution of certain portions against county funds shows that the Court's view was erroneous. In addition, it is not presently clear that in any subsequent litigation that the Commissioners Court could offer the full range of defenses it might present to the district court. For example, the Commissioners Court could present to the district court its defenses under *Monell* and a good faith immunity defense on behalf of Dallas County and the Commissioners Court. It is conceivable that subsequent litigation might be framed in a manner to limit such defenses. . . .

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief of Appellants have been forwarded by United States Mail, postage prepaid, to James C. Barber, 318 Merchants State Bank Bldg., 5217 Ross Avenue, Dallas, Texas, 75206, Attorney of Record for Plaintiff-Appellee, and to Ms. Sue Lagarde, Assistant District Attorney, Dallas County Government Cen-

ter, Dallas, Texas, 75202, Attorney of Record for Defendant-Appellee, this 11th day of July, A.D., 1979.

THOMAS V. MURTO III

APPENDIX "E"

In the

United States Distict Court

FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BENNY B. BARRETT vs. CARL THOMAS, Sheriff	No. CA3-77-1501-F

JUDGMENT

The Court hereby enters the following judgment in this case:

(a) Section 12 of the Sheriff's Code of Conduct is unconstitutionally vague and overbroad, and Sheriff Thomas, his agents and successors are hereby permanently enjoined from enforcing Section 12 of the Sheriff's Code of Conduct;

(b) Section 15 of the Sheriff's Code of Conduct is unconstitutionally vague and overbroad, and Sheriff Thomas, his agents and successors are hereby permanently enjoined from enforcing Section 15 of the Sheriff's Code of Conduct;

(c) Sheriff Thomas's General Rule 1 is unconstitutionally vague and overbroad, and Sheriff Thomas, his agents and successors are hereby permanently enjoined from enforcing Sheriff Thomas's General Rule 1;

(d) Sheriff Thomas's General Rule 2 is unconstitutionally vague and overbroad, and Sheriff Thomas, his agents and successors are hereby permanently enjoined from enforcing Sheriff Thomas's General Rule 2;

(e) Only 28 persons who filed claims with the court stating that they were individually entitled to a portion of any class relief granted by the court are potentially entitled to class relief in this case, and I enter judgment as follows on their claims:

(1) Bobby Don Baker is entitled to back pay from August 16, 1977 to June 30 1979 in the amount of $4,240.00 plus pre-judgment interest totaling $158.33, immediate reinstatement 30 days after the entry of final judgment in this case at full pay and benefits in the Dallas County Sheriff's Department as a sergeant, and "front pay" at the rate of $212.00 per month from June 30, 1979 to the date of his reinstatement as a sergeant;

(2) Benny Bob Barrett is entitled to back pay from August 23, 1977 to September 13, 1977 in the amount of $259.00 plus pre-judgment interest totaling $17.29, but he is not entitled to reinstatement, and his claim for defamation is dismissed without prejudice for lack of jurisdiction as a pendent state claim;

(3) Michael L. Berson is entitled to back pay from August 16, 1977 to May 31, 1978 in the amount of $1,890.00 and pre-judgment interest totaling $133.37;

(4) L. F. Chennault is entitled to back pay from August 16, 1977 to June 30, 1979 in the amount of $4,794.00 and pre-judgment interest in the amount of $17.22, immediate reinstatement 30 days after the entry of final judgment in this case at full pay and benefits with the Dallas County Sheriff's Department as a sergeant, and "front pay" at the rate of $212.00 per month from June 30, 1979 to the date of his reinstatement as a sergeant;

(5) James A. Cline is entitled to back pay from February 3, 1977 to December 31, 1978 in the amount of $4,682.00 and pre-judgment interest on that amount totaling $357.41;

(6) Jesse Gordon Earls is entitled to back pay from January 2, 1977 to February, 1978, in the amount of $2,284.00 and pre-judgment interest on that amount totaling $219.31;

(7) Gilbert F. Ellis, Jr. is entitled to back pay from May 16, 1977 to August 31, 1977 in the amount of $234.00 and pre-judgment interest totaling $24.14, immediate reinstatement 30 days after the entry of final judgment in this case at full pay and benefits in the Dallas County Sheriff's Department as a civil investigator, and "front pay" from June 30, 1979 in the amount of the differenc e between the pay of a civil investigator and the pay of a jailer to the date of his reinstatement as a civil investigator.

(8) Jess L. Hays is entitled to back pay from August 16, 1977 to June 30, 1979 in the amount of $4,656.00 and pre-judgment interest totaling $187.05, immediate reinstatement 30 days after entry of this judgment at full pay and benefits in the Dallas County Sheriff's Department as a sergeant, and "front pay" at the rate of $212.00 per month from June 30, 1979 to the date of his reinstatement as a sergeant;

(9) Roy Lee Heard is entitled to back pay from August 16, 1977 to June 30, 1979 in the amount of $4,622.00 plus pre-judgment interest totaling $183.74, immediate reinstatement 30 days after the entry of judgment in this case at full pay and benefits in the Dallas County Sheriff's Department as a sergeant, and "front pay" at the rate of $212.00 per month from June 30, 1979 to the date of his reinstatement as a sergeant;

(10) Ray F. Masters is entitled to back pay from August, 1977 to June 30, 1979 in the amount of $31,268.00 plus pre-judgment interest totaling $1,134.15, immediate reinstatement 30 days from the entry of judgment in this case at full pay and benefits in the Dallas County Sheriff's Department

as a lieutenant, and "front pay" at the rate of $1,615.00 per month from June 30, 1979 to the date of his reinstatement as a lieutenant;

(11) Walter Newell is entitled to back pay from January 1, 1977 to August, 1977, in the amount of $475.00 and pre-judgment interest on that amount totaling $41.88;

(12) Bobby J. Smith is entitled to back pay from January, 1977 to June 30, 1979 in the amount of $29,691.00 plus pre-judgment interest totaling $1,513.58, immediate reinstatement 30 days from the entry of final judgment in this case at full pay and benefits in the Dallas County Sheriff's Department as a sergeant, and "front pay" at the rate of $1,500.00 per month from June 30, 1979 to the date of his reinstatement as a sergeant;

(13) James W. Williams is entitled to back pay from August 16, 1977 to June 30, 1979 in the amount of $4,656.00 plus pre-judgment interest in the amount of $187.05, immediate reinstatement 30 days from the entry of judgment in this case at full pay and benefits in the Dallas County Sheriff's Department as a sergeant, and "front pay" in the amount of $212.00 per month from June 30, 1979 to the date of his reinstatement as a sergeant;

(14) Roger Lowther is entitled to immediate reinstatement 30 days from the entry of judgment in this case as a warrant sergeant with full pay and benefits, and "front pay" in the amount, if any, of the difference between the salary of a warrant sergeant and a sergeant in I.D., from June 30, 1979 to the date of his reinstatement as a warrant sergeant;

(15) Larry Gwinn is not entitled to any back pay, or reinstatement;

(16) Joseph Amos Bolt's class claim for relief is dismissed without prejudice;

(17) Jim H. Kitching is not entitled to back pay or reinstatement;

(18) Alvin Maddox, Jr. is not entitled to back pay or reinstatement;

(19) Jack Dunn is not entitled to any back pay or reinstatement;

(20) J. W. Finley is not entitled to any back pay or reinstatement;

(21) Marion J. Gregory is not entitled to any back pay or reinstatement;

(22) Nathaniel Harvey is not entitled to any back pay or reinstatement;

(23) Donald C. Higgins, Jr. is not entitled to any back pay or reinstatement;

(24) Judy A. Lollar is not entitled to any back pay or reinstatement;

(25) Bobbie J. Moore is not entitled to any back pay or reinstatement;

(26) Rosanna Rojo is not entitled to any back pay or reinstatement;

(27) Hector Sehwerert is not entitled to any back pay or reinstatement;

(28) Reggie L. Taylor is not entitled to any back pay or reinstatement;

(f) Plaintiffs' attorneys are entitled to recover $34,015.00 as attorney's fees in this case;

(g) All costs are hereby taxed against the Defendant;

(h) This judgment is entered against Carl Thomas, Sheriff, and draws no conclusions concerning the liability, if any, of the County of Dallas, Texas for complying with the provisions of this judgment.

It is so ORDERED.

UNITED STATES DISTRICT JUDGE

Date: May 30, 1979